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No. 75-40

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

HARRY E. O'DELL, JR., a minor, by his parents and next friends, HARRY E. O'DELL, SR., and JOYCE FLORAY and HARRY E. O'DELL, SR., and JOYCE FLORAY, Individually,
Petitioners,

vs.

SCHOOL DISTRICT OF INDEPENDENCE, MISSOURI,
Respondent.

BRIEF OF STATE OF MISSOURI, AMICUS CURIAE, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE

The State of Missouri, by John C. Danforth, Attorney General, asks leave of this Court to appear as amicus curiae in opposition to the Petition for Writ of Certiorari and, should the writ be granted, on the merits.

INTEREST OF STATE OF MISSOURI

This application for filing of a brief as amicus curiae is made on behalf of the State of Missouri by its Attorney General pursuant to Rule 42.4 of this Court.

The issues raised by petitioners herein in their Petition for a Writ of Certiorari involve important questions of Missouri law. It is the position of amicus that the doctrine of sovereign immunity is a fundamental public policy of the State of Missouri, and any modification or abrogation of that rule would require extensive legislative action by the Missouri General Assembly. Although the instant lawsuit is directed merely at one school district of the State of Missouri, the arguments of petitioners are equally applicable to every governmental unit in the State.

The Attorney General has previously participated in this case, appearing as amicus curiae before the Supreme Court of Missouri, EnBanc.

QUESTIONS PRESENTED

1. May a state decline to consent to suits against it or its political subdivisions for the alleged tortuous acts of its employees?

2. Does the enactment of a law which provides, as compensation, legal defense and limited indemnification for a number of designated state employees in case of a suit against them for damages, require the waiver of sovereign immunity as to suits filed directly against political subdivisions of the state?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of Section 105.710, RSMo, as amended in 1974, is set out below. The language which appears at pp. A-50-51 of petitioners' Petition, is the statute after its 1973 amendments.

> "105.710. Tort defense fund, how used, who covered by
> "1. As part of the compensation to be piad [sic] to the director of the division of corrections, the director of the department of social services, the director of the division of health, the director of the division of family services, the curators and regents of public institutions of higher education which award baccalaureate degrees, the director of the department of mental health, the adjutant general, the head of state parks in the department of natural resources, other officers, employees and agents of the division of corrections, the division of health, the division of family services, the department of mental health, members of the Missouri national guard and officers and employees of the department of natural resources assigned to state parks and the administration of state parks the commissioner of administration is authorized to pay from the Tort Defense Fund, which is hereby created, all final judgments awarded in courts of competent jurisdiction to any claimant against the aforesaid officers, employees, agents and members of the Missouri national guard, for acts arising out of and performed in connection with their official duties in behalf of the state. Payment shall be limited to a maximum of one hundred thousand dollars for all claims, arising out of the same act except that no payment shall be made for any claim which arises because of or in connection with the opera-

tion of a motor vehicle either privately or publicly owned.

"2. The attorney general shall investigate each claim and if he finds that the alleged damaging acts were performed in connection with the official duties of the person against whom the claim is made he shall prepare a defense. As a part of the compensation to be paid to officers and employees of public institutions of higher education which award baccalaureate degrees, the aforementioned investigation and defense preparation is hereby authorized and shall be done by legal counsel provided by the institution of higher education.

"3. The attorney general may negotiate and compromise any claim covered by this act which he deems valid and payment shall be made out of the tort defense fund by the commissioner of administration with the approval of the attorney general.

"Laws 1967, p. 196, §§ 3 to 6. Amended by Laws 1969, p. 187, § 1; Laws 1972; p. 641, § 1; Laws 1973, p. ——, H.B. No. 500, § 1; Laws 1974, p. ——, H.B. No. 1734, §1."

STATEMENT OF THE CASE

The statement of the case set out at pages 4 through 6 of petitioners' Petition is substantially accurate. A personal injury suit filed by petitioners against the School District of Independence, Missouri, a political subdivision of the State of Missouri, was dismissed before trial. The pleadings in the trial court are contained in Appendixes C, D and E, pages A-44 through A-49, found in petitioners' Petition.

The decision of the trial court was appealed by petitioners to the Missouri Supreme Court. After briefs and arguments were submitted to Division No. 1 of the Supreme Court of Missouri, the cause was transferred before opinion to the Supreme Court EnBanc on the court's own motion. In addition to the participation of the original parties, the Attorney General filed a brief with the court EnBanc and one of his assistants participated in oral argument. The issues raised by petitioners in the Supreme Court of Missouri included, in addition to the constitutional questions presented to this Court, the full range of legal and policy arguments which can be made in opposition to the doctrine of sovereign immunity.

In its decision of March 10, 1975, the Missouri Supreme Court, EnBanc, affirmed the decision of the trial court dismissing petitioners' action for damages. The majority opinion of the Missouri Supreme Court held that the doctrine of sovereign immunity was created by the Missouri General Assembly, and that recent enactments of the legislature served "as positive statements by the General Assembly of its view that the general concept of sovereign immunity should be retained in Missouri." (A-12)

REASONS FOR DENYING THE WRIT

I

In Palmer v. Ohio, this Court specifically upheld the right of a state not to consent to be sued in tort in its own courts.

The precise arguments raised by petitioners herein have been previously decided by this Court. In *Palmer* v. *Ohio*, 248 U.S. 32, 39 S.Ct. 16, 63 L.Ed. 108 (1918), this Court refused to overturn a decision of the Ohio Supreme Court that the State of Ohio could not be sued in tort. Because the facts of that case are so in point with those raised by petitioners herein, it is worthwhile to quote the body of the *Palmer* decision in full:

> "The plaintiffs in error sued the State of Ohio for damages for flooding lands by elevating the spillway of a state-maintained dam. The Supreme Court of the State affirmed the action of the lower courts in dismissing the petition on the ground that the State had not consented so to be sued, and we are asked to review this decision.
>
> "The plaintiffs in error agree, as they must, that their suit cannot be maintained without the consent of the State, but they claim that such consent was given in an amendment to § 16 of Article I of the state constitution, adopted in 1912, which reads:
>
> " '*Suits may be brought against the State, in such courts and in such manner, as may be provided by law.*'
>
> "The State Supreme Court held that this amendment is not self-executing, and that the General Assembly of the State having failed to designate the courts and the manner in which such suits might be brought, effective consent to sue had not been given. This decision, the plaintiffs in error claim, vaguely and in-

definitely, somehow deprives them of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

"The right of individuals to sue a State, in either a federal or a state court, cannot be derived from the Constitution or laws of the United States. It can come only from the consent of the State. *Beers* v. *Arkansas*, 20 How. 527; *Railroad Company* v. *Tennessee*, 101 U.S. 337; *Hans* v. *Louisiana*, 134 U.S. 1. Whether Ohio gave the required consent must be determined by the construction to be given to the constitutional amendment quoted, and this is a question of local state law, as to which the decision of the State Supreme Court is controlling with this court, no federal right being involved. *Elmendorf* v. *Taylor*, 10 Wheat. 152, 159; *Old Colony Trust Co.* v. *Omaha*, 230 U.S. 100, 116; *Memphis Street Ry. Co.* v. *Moore*, 243 U.S. 299, 301.

"The further claim that the plaintiffs in error are deprived of their property without compensation in violation of the Fifth Amendment to the Constitution of the United States, is palpably groundless. *Barron* v. *Baltimore*, 7 Pet. 243, 250; *Brown* v. *New Jersey*, 175 U.S. 172, 174.

"No federal question being presented by the record, the motion to affirm is denied and this court, *sua sponte*, dismisses the writ of error for want of jurisdiction.

"*Dismissed.*"

It is submitted that the decision of this Court in *Palmer* v. *Ohio*, *supra*, settled the issues raised by petitioners herein, and thereby is sufficient grounds for denying the Writ of Certiorari.

II

The principle that the sovereign, whether the United States or an individual state, is immune from suit and that the consent of the sovereign is necessary before a suit may be filed against it, has been consistently reaffirmed by this Court.

A reading of the Petition for Writ of Certiorari suggests that the problem of a state sovereign immunity has never before come to this Court. To the contrary, this Court has, at least since the enactment of the Eleventh Amendment, consistently upheld the right of a sovereign to refuse consent to be sued.

For example, in the case of *Beers.* v. *Arkansas,* 61 U.S. (20 How.) 527, 15 L.Ed. 991 (1858), it is said:

> "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it." *Id.* at 992.

In the leading case of *Hans* v. *Louisiana,* 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), this Court engaged in a lengthy discussion outlining the history and justification of the doctrine of sovereign immunity. The Court held that the importance of the doctrine was so great that this Court would not permit a suit against a state by its own citizens in federal court.

In *Ex parte New York*, 256 U.S. 490, 41 S.Ct. 588, 65 L.Ed. 1057 (1921), this Court granted a writ of prohibition to prevent a maintenance of an admiralty suit which, this Court found, was in substance one against the State of New York. The heart of the decision was contained in the following language:

> "That a state may not be sued without its consent is a fundamental rule of jurisprudence, having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a state, without consent given; not one brought by citizens of another state, or by citizens or subjects of a foreign state, because of the 11th Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification. . . ." *Id.* at 1060.

This Court has continued to apply these principles in cases such as *Ford Motor Company* v. *Department of Treasury*, 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 (1945); and *Parden* v. *Terminal Railway of Alabama Docks Department*, 377 U.S. 184, 191-192, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964).

This Court has applied the same standards to suits against the United States. In the early cases of *Gibbons* v. *United States*, 75 U.S. 269, 19 L.Ed. 453 (1869), and *Langford* v. *United States*, 101 U.S. 341, 25 L.Ed. 1010 (1880), this Court held that no action could be maintained against the United States for the tortious acts of its employees. With the enactment of the Federal Tort Claims Act, 28 U.S.C., Section 2680 (1970), the Congress granted its consent to certain tort actions against the United States.

In cases under the Act, this Court has proceeded from the position that a claimant against the United States must show that he is within the terms of the Act or his suit will be barred by the sovereign immunity of the United States. *Dalehite* v. *United States,* 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953); *Indian Towing Company* v. *United States,* 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955); *Laird* v. *Nelms,* 406 U.S. 797, 92 S.Ct. 1899, 32 L.Ed.2d 499 (1972).

In short, for this Court to grant the relief requested by petitioners would require not merely the rejection of a settled body of law but the destruction of a "fundamental rule of jurisprudence." *Ex parte New York, supra.*

III

The State of Missouri does not consent to suits against it or its political subdivisions for the alleged tortious acts of its employees.

The cases cited above make it clear that the consent of the sovereign, whether it be the United States or an individual state, is necessary before a court may assume jurisdiction over a suit against the sovereign. The law in Missouri is clear that no consent has been granted to any suit directly against the State or its political subdivisions for the alleged tortious acts of its employees.

Of course, the most recent and most authoritative statement of this rule appears in the very case now before this Court. In its decision, the Missouri Supreme Court, EnBanc, ruled that the principle of sovereign immunity was created by the Missouri General Assembly and has been reaffirmed by that body many times in the life of this State. Further, there are numerous appellate court decisions in recent years in Missouri holding that the state is immune from suit. See, e.g., *Kleban* v. *Morris,* 247 S.W.2d 832 (Mo. 1952)

(tax refund); *State ex rel. Eagleton* v. *Hall*, 389 S.W.2d 798 (Mo.Banc 1965) (will contest); *Wood* v. *County of Jackson*, 463 S.W.2d 834 (Mo. 1971) (tort suit against county); *Kersh* v. *State of Missouri*, 487 S.W.2d 872 (Mo.App. 1972) (tort action against state agency).

Therefore, it is the settled law of the State of Missouri that no suit may be filed against the state or one of its political subdivisions in the absence of its prior consent to that suit by the General Assembly.

IV

The Missouri Tort Defense Fund Act, Section 105.710, RSMo Supp. 1975, applies only to certain designated state officials and has no application to this case.

In addition to claiming that sovereign immunity is unconstitutional, petitioners have attempted to argue that, since Missouri's Tort Defense Fund Act does not apply to suits against school district, they are denied the equal protection of the laws. This claim of petitioners is wholly frivolous.

The Tort Defense Fund Act, Section 105.710, RSMo Supp. 1975, was first enacted in substantially its present form in 1969, and was subsequently amended in 1972, 1973 and 1974. Each amendment has somewhat enlarged the coverage of the Fund, and, in addition, the 1974 amendment revised the titles of the people covered to correspond with Missouri state government reorganization. *See*, 1972 Amendments to Article IV of the Constitution of Missouri, 1945. The text of the statute which appears in petitioners' petition is that of the 1973 amendments; the current text of the statute is set out in the introductory portions of this brief.

There are no Missouri appellate decisions under the Tort Defense Fund Act, but a simple examination of the

law shows its clear inapplicability to this case. In Subsection 1, the Act states that "as part of the compensation" of certain designated public officials employed by the state government, the State of Missouri will pay up to $100,000 with respect to:

> ". . . all final judgments awarded in courts of competent jurisdiction to any claimant against the aforesaid officers, employees, agents and members of the Missouri national guard, for acts arising out of and performed in connection with their official duties in behalf of the state. . . . except that no payment shall be made for any claim which arises because of or in connection with the operation of a motor vehicle either privately or publicly owned."

Subsection 2 of the Act provides that the enumerated employees shall be provided legal defense of the suits against them by the Attorney General, while Subsection 3 authorizes the Attorney General to make settlements of cases he is handling.

The Tort Defense Fund does not on its face, and has never been held to, waive any of the State's sovereign immunity. The only suits discussed in the statute are suits against individuals, not suits against the State, its agencies or political subdivisions. Further, the legislature has clearly expressed a desire to limit the coverage of the law to officials at the state level—no local officials of any kind are included—whose performance of their public duties may be impaired by the threat of damage suits over them. The Attorney General of Missouri, in defending suits pursuant to this statute, has consistently argued that the enactment of the statute waives no personal defense of the defendants, including whatever official immunity they may possess, and to date, no court has held to the contrary.

Thus, the State of Missouri, by enacting Section 105.710,

has waived neither a portion of its sovereign immunity nor the official immunity to any of its employees. Rather, the State has, in essence, provided a limited equivalent of an "errors and omissions" insurance policy for certain of its employees as part of their compensation. Respondent School District of Independence could have chosen to have done the same for its employees, although it is not required to under Missouri law, but neither the actual act of the State or the possible act of the school district protecting individual employees would have waived the sovereign's own immunity from suit.

CONCLUSION

Because the established principles of law long applied by this court completely resolve the questions raised by petitioners in a manner adverse to them and consistent with the decision of the Supreme Court of Missouri below, amicus curiae urges this court to deny petitioners' petition for a writ of certiorari.

Respectfully submitted,

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